Supreme Court
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No. 95-1204

In the Supreme Court of the United States

OCTOBER TERM, 1995

FRANKLIN E. SKEPTON, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's order holding petitioner in civil contempt based on the knowledge and actions of his employee in refusing to honor a warrant authorizing the Occupational Safety and Health Administration to conduct an inspection of the petitioner's worksite.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a), the district court's bench memorandum (Pet. App. 3a-6a), and the district court's civil contempt order (Pet. App. 7a-9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1995. The petition for a writ of certiorari was filed on January 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the general administrative plan of the Occupational Safety and Health Administration (OSHA) for "programmed" inspections, a safety

inspection was scheduled of the worksite at Nitschman Middle School in Bethlehem, Pennsylvania, where petitioner Franklin E. Skepton, a sole proprietor, was engaged in construction work. Because of petitioner's established history of resisting safety inspections at his jobsites, OSHA had sought and obtained an inspection warrant from United States Magistrate Judge Arnold C. Rapoport, which it served upon petitioner via his employee and job foreman, Paul Skepton (Skepton), at the Middle School jobsite on January 13, 1995. Skepton, however, refused to let the OSHA inspectors enter the jobsite because the warrant referred to the wrong county and because he claimed the warrant was "too broad." That same day, the agency returned the unexecuted warrant to the magistrate judge to correct the error concerning the name of the county, and obtained the warrant at issue in this case. Pet. App. 4a-5a.

At approximately 8:00 a.m. on January 17, 1995, two OSHA inspectors served the corrected warrant upon Paul Skepton, who again "willfully refused to comply with said warrant, and told plaintiff's inspectors that they would not be permitted to conduct an inspection."[1] Pet. App. 5a. After failing to resolve the matter informally, OSHA initiated the underlying petition to hold petitioner in civil contempt, pursuant to 18 U.S.C. 401(3). See Pet. App. 3a-4a.

2. Because Paul Skepton, as foreman, was giving orders on the job, had a key to the construction trail-

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[1] Petitioner asserts that "[t]here is a dispute as to whether Paul G. Skepton informed [the Secretary's inspector] that an inspection was not going to be permitted." Pet. 4. The district court, however, resolved that factual matter against petitioner. Pet. App. 5a. Petitioner does not ask this Court to reverse that factual finding as clearly erroneous.

er, and had voiced objections to the earlier warrant, the district court found that he had apparent authority to receive service of this warrant. The court also found that after being properly served with this warrant, Skepton refused to permit an inspection and thus willfully refused to comply with the warrant. After finding that Skepton was an agent and employee of petitioner, the court concluded that the willful refusal voiced by him constituted a refusal on the part of petitioner. Pet. App. 4a-5a. Noting that it was seeking "to compel compliance with lawful process," the court accordingly held petitioner in civil contempt for the "willful refusal of his employee to obey lawful process." *Id.* at 5a. The district court issued an order forbidding petitioner and his agents, employees, and foremen from preventing or obstructing an OSHA inspection, and ordering petitioner to authorize his job foreman or some other employee to accept service and comply with any lawful warrant issued by the court. Pet. App. 8a. The court awarded OSHA $4,189 to make it whole for the costs incurred in attempting to execute the warrant, and prescribed "an additional fine of $5,000.00 per day for each day [its] contempt order is not complied with." *Id.* at 5a, 8a. Nothing in the record indicates that petitioner incurred any fine (beyond the initial assessment of $4,189 to compensate the government for its costs) by not complying with the district court's order.

3. The court of appeals affirmed by judgment order. Pet. App. 1a-2a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or

any other court of appeals. Accordingly, further review is unwarranted.

1. The Occupational Safety and Health Act of 1970 (OSH Act) authorizes the Secretary of Labor to "inspect and investigate" any place of employment within his jurisdiction in order to carry out the purposes of the Act. See 29 U.S.C. 657(a).[2] The Secretary conducts two types of inspections under the OSH Act—inspections initiated based on specific evidence of a violation, and inspections made pursuant to a general enforcement plan. He must, however, obtain a warrant before he may conduct a nonconsensual inspection. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978). In the present case, the application for the warrant was based on a general administrative plan, Pet. App. 4a, and petitioner does not here challenge that plan or the propriety of the warrant's issuance under it. Because the warrant admittedly was valid, the district court properly held petitioner in contempt and imposed a fine of $4,189 in

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[2] Section 657(a) states:

> In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
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> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, work place or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

government costs after his agent and employee refused to honor the warrant.

2. Petitioner argues that "a non-party may be held liable for contempt if he either abets or is legally identified with the named defendant, but those not legally identified must have actual knowledge of the Order to be bound." Pet. 6. That principle, however, has no applicability here, since the district court held the party (petitioner), rather than the non-party (Paul Skepton), in contempt.[3] Petitioner argues that the district court improperly invoked a "doctrine of vicarious liability" (*ibid.*) to hold him in contempt "for the act of his employee whose act he neither authorized, consented to, nor ratified." Pet. 7. The district court, however, properly relied on evidence showing that Paul Skepton, as job foreman, was in charge of the jobsite on the day in question, to conclude that Paul Skepton had apparent authority to accept service of the warrant and to allow the inspection on behalf of petitioner. Pet. App. 5a. Indeed, petitioner does not directly challenge that finding (which would not in any event warrant review by this Court) or dispute that ordinary principles of agency apply in this regard.[4] See Anthony Aldridge

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[3] Petitioner errs in relying (Pet. 7) on *In re Public Service Co.*, 848 F. Supp. 318 (D.R.I.), aff'd, 43 F.3d 763 (1st Cir. 1994), cert. denied, 115 S. Ct. 1959 (1995). That case involved a non-party held liable for contempt.

[4] Petitioner does assert that "[a] person is liable for civil contempt *only* if he violates a Court Order with actual notice that the Order has been issued." Pet. 8 (emphasis added). But the case upon which he relies for that proposition actually frames it as a sufficient condition, not a necessary one: "A person is liable for civil contempt *if* he violates a court order with actual notice that the order has been issued." *Thompson*

& David Eady, *The Law of Contempt* 268-269 (1982). In particular, "the principles of agency law dictate that, as between a principal and a third party dealing with an agent of that principal, a third party should and must be able to rely upon the acts of the agent which are performed with either actual *or apparent* authority." *In re Fowler*, 16 B.R. 596, 597 (Bankr. S.D. Ohio 1981) (emphasis added) (holding principal who lacked actual notice guilty of contempt where agent had notice of pendency of bankruptcy proceeding).

3. Petitioner also appears to suggest that the district court violated due process by holding him in contempt "of an Order of which he had no knowledge." Pet. 8. That issue, however, is not before the Court. The questions presented for review mention no constitutional claim. See Pet. i. Moreover, petitioner

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v. *Johnson*, 410 F. Supp. 633, 640 (E.D. Pa.) (emphasis added), aff'd, 566 F.2d 568 (3d Cir. 1976) (Table). Because the putative contemnors in *Thompson* did all have knowledge of the court order, see 410 F. Supp. at 640, that case could not establish the negative proposition espoused by petitioner.

Similarly, petitioner's reliance (Pet. 7) on *United States* v. *Taystee Baking Co.*, 55 F. Supp. 490 (N.D. Tex. 1944), is misplaced. "That case is distinguishable since the United States there was seeking an injunction, not contempt for the violation of a prior [court order]." *Singer Mfg. Co.* v. *Sun Vacuum Stores, Inc.*, 192 F. Supp. 738, 742 (D.N.J. 1961). Although "in dictum the [*Taystee Baking*] [c]ourt seemed to indicate that a corporation should not be held in contempt as a matter of discretion in seeking an equitable result where the corporation issues orders for compliance, but its employees violate such orders," *ibid.*, even then the *Taystee Baking* court claimed only to be enunciating "[a]n equitable rule," 55 F. Supp. at 494, not a constitutional or other unyielding limit on the power of a district court to issue a civil contempt citation.

raised no due process challenge to the contempt proceedings in the district court, see C.A. App. 214-215 (answer to petition for adjudication of civil contempt), 216-217 (memorandum in opposition to petition for adjudication of contempt), 233-235 (answer to motion for assessment of compensatory fine), 1-129 (transcript of hearing on contempt motion), and he did not argue to the court of appeals that he had been denied due process of law, see Pet. C.A. Br. iv (statement of issues presented for review), 9-10 (summary of argument).[5]

In any event, there is no merit to petitioner's suggestion that the district court's contempt sanction violated due process. The case law requiring actual notice ensures that contempt will not lie where the contumacious activity was performed unknowingly, that is, without knowledge of the court order it violates. Here, Paul Skepton was served with the inspection warrant and knew full well that he was disregarding the district court's order by telling the

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[5] Petitioner alluded to constitutional due process requirements in but one sentence in his court of appeals brief. See Pet. C.A. Br. 13-14. That passing reference, which did not even cite any precedent, is insufficient to have raised a constitutional argument. See, *e.g.*, *Kost* v. *Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) ("[C]asual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal."); *id.* at 182 ("[T]o assure consideration of an issue by the court, the appellant must both raise it in [the] Statement of the Issues and pursue it in the Argument section of the brief."), quoting 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3974, at 421 (1977 and Supp. 1993, at 690); *Manna* v. *United States Dep't of Justice*, 51 F.3d 1158, 1165 n.8 (3d Cir.) ("Manna's mere mention of an analogy between [two legal provisions] is insufficient to raise this issue on appeal."), cert. denied, 116 S. Ct. 477 (1995).

OSHA inspector not to inspect the worksite. Prior to entering its contempt order, the district court afforded petitioner "notice and some kind of hearing" (Pet. 8), at which petitioner contested whether Paul Skepton, his employee and agent, had actually refused to comply with the inspection warrant. The court resolved that issue against petitioner, consistent with the dictates of due process, and petitioner was properly held liable on general agency principles for his agent's knowing violation of the court's order. *In re Fowler*, 16 B.R. at 597-598;[6] cf. *NLRB* v. *Crown Laundry & Dry Cleaners, Inc.*, 437 F.2d 290, 293 (5th Cir. 1971) ("Since * * * the Company, *through its agent* Baxter, has violated * * * this Court's earlier order, we have no choice but to adjudge the Company in civil contempt.") (emphasis added). That fact-bound determination raises no issue of general importance for this Court to resolve.

There likewise was nothing objectionable or extraordinary about the court's choice of sanction. The district court's order did not threaten petitioner's liberty. The only funds that it required petitioner to pay for the past refusal to comply with the warrant merely compensated the government for the costs it had incurred as a result of petitioner's agent's violation. Cf. *Farber* v. *Rizzo*, 363 F. Supp. 386, 394-395 (E.D. Pa. 1971) ("Civil contempt is intended to enforce compliance with a court order or to com-

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[6] The court awarded no damages in *Fowler* because there was no record evidence of any damages caused by the contumacious conduct. 16 B.R. at 598. Here, however, respondent detailed the costs imposed by petitioner's refusal to comply with the inspection warrant. See C.A. App. 220-232 (government's motion for assessment of compensatory fine with supporting declarations).

pensate for losses or damages sustained because of a violation of the order.").

4. Finally, there is also no merit to petitioner's suggestion (Pet. 9-10) of a First Amendment violation assertedly flowing from his being held in contempt for not verbally consenting to, but instead objecting to, the inspection warrant. The district court held petitioner in contempt not because of his views, but instead based on petitioner's actions and those of Paul Skepton, his agent and employee. The notion that either OSHA or the court violated petitioner's First Amendment rights by requiring him to comply with an inspection warrant is baseless. Indeed, the petition does not include a First Amendment issue in the questions presented for review, see Pet. i, and petitioner does not cite any authority supporting his view that he is illegally being forced "to verbally express his 'consent' to an OSHA inspection." Pet. 9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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